U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 08Jul2002

In the matter of	)	
	)	
LIZZIE MCKAMEY,	)	
Claimant,	)	
	)	
v.	)	
	)	
KEY MINING, INC./	)	Case No. 2001 BLA 84
KLINE COAL COMPANY, INC.,	)	2001 BLA 85
Employer,	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
Party-in-interest.	)	
	)	

Appearances: Dorothy B. Stulberg, Esq.
For Claimant

Martin E. Hall, Esq.
For Employer

Before: JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This claim was filed pursuant to the Black Lung Benefits Act of 1972, as amended. 30 U.S.C. § 901 *et seq*. Mrs. Lizzie McKamey ("Widow") seeks benefits on behalf of her deceased husband ("Miner's claim"), and as his surviving spouse ("Survivor's claim").[1] The Miner's claim was decided and appealed on four occasions and its denial was eventually upheld by the United States Court of Appeals for the Sixth Circuit. The Miner's claim now appears on modification, while the Survivor's claim is considered here for the first time. In the interests of judicial economy, I hereby consolidate these two claims, but recognize that they are distinct and consider them independently. Given the patchwork of determinations, decisions, and appeals which underlie these claims, I will set forth their full background and history.

[1]In this decision I refer to the Miner and the Widow separately for the sake of clarity due to the complicated history of this claim.

Background and History

Mr. Lonza McKamey ("the Miner") originally filed for black lung benefits in 1987. After conducting a hearing in Knoxville, Tennessee, Administrative Law Judge E. Earl Thomas denied the Miner's claim for benefits on July 17, 1989. (D-41.) Judge Thomas credited the Miner with forty-two and three-quarters years of coal mine employment and found: the Miner had established the existence of pneumoconiosis by x-ray evidence, that he was entitled to the rebuttable presumption that the pneumoconiosis was related to his coal mine employment, and the Widow was his dependent. Judge Thomas denied benefits, however, because the Miner failed to establish total disability by pulmonary function and blood-gas studies or by medical opinion evidence. On reconsideration, Judge Thomas found that the Miner had established changed employment circumstances pursuant to Section 718.204(e), but found that he had not established total disability on March 6, 1990. (D-46.)

On July 25, 1991, the Board vacated Judge Thomas' finding that the Miner failed to establish total disability by a preponderance of the medical opinion evidence because Judge Thomas credited irrelevant opinion evidence and failed to consider one physician's consultative opinion. (D-56.) The Board remanded the claim for Judge Thomas to re-weigh the medical opinion evidence and consider whether the Miner was totally disabled, and if so, whether it was due to pneumoconiosis.

The Miner's employer at that time, River Basin Coal Company ("River Basin"), filed a motion for reconsideration which the Board denied on October 30, 1991. (D-59.)

On December 21, 1991, before the claim reached Judge Thomas on remand, the Miner filed a motion to expedite the proceeding and submitted additional medical evidence. (D-61.) River Basin's response of December 24, 1991 expressed its mistaken belief that jurisdiction remained at the Board awaiting action on the Miner's motion for correction. River Basin argued that the record should not be reopened and requested sufficient time to respond to the new evidence. (D-62.) On January 8, 1992, Judge Thomas denied the Miner's motion to expedite and refused to receive the new evidence because the file had not yet been received. (D-65.) He returned the new evidence to the Miner for possible re-submission.

On February 11, 1992, Judge Thomas, without soliciting briefs from the parties, issued his decision on remand. (D-66.) Judge Thomas interpreted the Board's decision as supporting Dr. Seargeant's "medical assessment" as a sufficiently reliable "inference" of total disability.[2] Judge Thomas found that Dr. Anderson's opinion that the Miner was not totally disabled was reasoned. Judge Thomas believed that the Board's order left him the choice of determining the issue of total

[2]While completing an examination form, Dr. Seargeant merely repeated the Miner's complaints in the "medical assessment" section rather than stating his medical diagnosis. This fact was not determined until River Basin sought to clarify the statement.

disability according to either Dr. Seargeant's inference of total disability or Dr. Anderson's contrary opinion. Judge Thomas concluded that the Miner had established total disability considering the purpose of the Black Lung Benefits Act, his personal observation of the Miner, and Dr. Seargeant's inference. Judge Thomas found that Dr. Anderson's opinion was based merely on technical analysis, did not consider the Miner's extensive employment in the coal mines, and did not have the benefit of personally examining the Miner.

River Basin filed two motions for reconsideration with Judge Thomas because it believed the claim was still pending before the Board. (D-67.) River Basin argued that it had sought sufficient time to respond to the Miner's new evidence, was preparing evidence to clarify Dr. Seargeant's report, and argued that the Miner had continued working for another coal mine operator. (D-68.) On June 14, 1991, River Basin sold the mine at which the Miner had worked to Kline Coal Company, Inc. ("Employer"). (D-145.) Judge Thomas denied River Basin's motions because he had returned the claim to the District Director. (D-69.) River Basin subsequently appealed Judge Thomas' order on remand and order denying reconsideration. (D-70.)

On appeal, the Board observed that River Basin had requested an opportunity to respond to the Miner's new evidence and vacated Judge Thomas's decision and order for failing to address Dr. Seargeant's clarification given the prejudicial effect this had on River Basin. (D-81.) The Board also found that Judge Thomas had apparently applied the "true doubt" rule in resolving the conflict between Doctors Seargeant and Anderson.[3] Consequently, the Board vacated Judge Thomas's finding that the medical opinion evidence established total disability. The Board remanded the claim for further consideration of whether to admit Dr. Seargeant's clarification, whether the Miner had met his burden of proof regarding total disability, and if so, whether the Miner's total disability was due "at least in part" to his pneumoconiosis.

When the claim returned to the Office of Administrative Law Judges, Associate Chief Administrative Law Judge James Guill ruled on newly submitted medical evidence by the Miner before reassigning the claim. Judge Guill declined to admit two medical exhibits regarding the existence of pneumoconiosis, reasoning that River Basin did not consent to their admission as required by 20 C.F.R. § 725.456(b)(2) (1995), that both exhibits were conclusory, and that both were outside the scope of the Board's order of remand because Judge Thomas had already found – and the Board affirmed – the existence of pneumoconiosis. (D-86.) The claim was then reassigned to Judge Romano.

In a January 19, 1996 decision and order, Judge Romano declined to receive River Basin's letter of clarification from Dr. Seargeant because he deemed it new evidence that could have been offered before Judge Thomas' prior award of benefits. (D-93.) Judge Romano recited much of Judge Thomas' analysis regarding the issue of total disability and found that the Miner had met his

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[3]The United States Supreme Court had recently decided Director, OWCP v. Greenwich Collieries, 114 S. Ct. 2251 (1994), holding that the true doubt rule violated the Administrative Procedure Act.

burden of proving entitlement, regardless of the true-doubt rule. Judge Romano concluded that the medical evidence in the record, when weighed against the contrary probative evidence, demonstrated total disability due at least in part to pneumoconiosis, and granted benefits. As a result, the Office of Workers' Compensation Programs ("OWCP") requested payment of accumulated compensation and ongoing benefits from River Basin. (D-99.)

The Miner submitted a medical report from Dr. Burrell on January 24, 1996, five days after Judge Romano's decision awarding benefits. While on appeal at the Board, the Miner argued that if an ALJ later admits Dr. Seargeant's letter of clarification, Dr. Burrell's report should be admitted as well. (D-104 at 12.)

On November 26, 1996, the Board vacated and remanded Judge Romano's decision and order for refusing to admit Dr. Seargeant's letter of clarification . (D-110.) The Board held that Judge Romano's finding of total disability – by reciting several passages of Judge Thomas's decision – did not comply with the Administrative Procedure Act and remanded that issue to "weigh all the relevant evidence together, both like and unlike, in reaching [a] conclusion." (D-110 at 5.) The Board also vacated Judge Romano's conclusion that the evidence was sufficient to establish that pneumoconiosis was due to coal dust exposure. The Board denied River Basin's request that the claim be remanded to the District Director regarding its designation as the responsible operator and ordered that should benefits be granted, the date of entitlement must be determined. The Board did not consider Dr. Burrell's report. In response to the Board's ruling, the OWCP suspended payment of benefits on February 3, 1997. (D-112.)

On remand, in a June 20, 1997 decision and order, Judge Romano denied benefits. (D-119 at 82.) Judge Romano found Dr. Seargeant's letter to be a clarification of his prior report, not an additional examination or new evidence, and admitted it to insure a full and fair hearing on all the issues. Judge Romano also admitted two records submitted by the Miner, both indicating the existence of pneumoconiosis, despite the fact that the existence of pneumoconiosis had already been established. Judge Romano did not address Dr. Burrell's report. Judge Romano found that Dr. Seargeant did not personally assess the Miner's disability in his report but merely related the Miner's stated limitations, found the remaining medical reports insufficient to establish total disability, and denied benefits.

The Miner petitioned the Board to review Judge Romano's decision, arguing that Judge Romano had improperly admitted Dr. Seargeant's letter, that the Miner was not given the opportunity to respond to Dr. Seargeant's letter, and that Judge Romano improperly weighed the medical and lay evidence. (D-119 at 51.) The Miner mentioned Dr. Burrell's report, but did not challenge Judge Romano's failure to consider it. The Miner included with his brief to the Board an August 18, 1997 report from Dr. Bruton. (D-119 at 66.)

On July 2, 1998, the Board held that Judge Romano acted within his discretion in admitting Dr. Seargeant's letter (as well as the Miner's repetitious evidence of pneumoconiosis). The Board declined to consider Dr. Burrell's and Dr. Bruton's reports because they had not been

introduced in the record, and did not address Dr. Bruton's nor Dr. Hall's reports because they did not address total disability. The Board affirmed that Dr. Seargeant's assessment was insufficient to establish total disability given his letter of clarification and affirmed Judge Romano's denial of benefits.

The Miner died on April 24, 1999 and his widow appealed the Board's decision to the United States Court of Appeals for the Sixth Circuit on his behalf. *See* McKamey v. River Basin Coals, Inc., No. 98-3946 (6th Cir. Aug. 11, 1999). The Sixth Circuit held that Judge Romano properly admitted Dr. Seargeant's letter because it was not barred as post-hearing evidence, it clarified the ambiguity in Dr. Seargeant's initial medical assessment, and there was little doubt that good cause existed to admit such evidence because it clarified a "crucial point". Id. at 6. The Sixth Circuit also held that the claim should not be remanded for another pulmonary evaluation because no rule required such action and the Miner was already deceased. Lastly, the Sixth Circuit noted that the Board properly declined to consider the medical reports of Doctors Bruton and Burrell because they had not been received in evidence and concluded that Judge Romano's findings were supported by substantial evidence. The Sixth Circuit affirmed the Board's decision and upheld Judge Romano's denial of benefits.

The Widow filed her Survivor's claim on July 12, 1999. (D-122.) On November 2, 1999, the Widow submitted reports issued by Doctors Burrell and Bruton. (D-139.) The District Director considered the submission of these reports to be a request for reconsideration of her Survivor's claim and as a request for modification of the Miner's claim. (D-143, 147.) The Widow then submitted further evidence of a chest x-ray interpretation and medical records dating back to 1974. (D-144.) The District Director obtained a consultative report from Dr. Joshua Perper, who concluded that coal workers's pneumoconiosis was a substantial contributory cause of the Miner's death. (D-153.)

The District Director determined that the Widow was entitled to benefits on October 3, 2000 and awarded benefits dating back to April 1, 1999, the beginning of the month during which the Miner died. (D-167, 170.)

Medical Evidence

X-Rays

Date of x-ray	Date of reading	Physician	Qualifications	Film quality	Results	Exhibit
09/10/75	09/10/75	Dukes			Generalized nodular pulmonary fibrosis having the appearance of pneumoconiosis	D-144
05/06/82	05/07/82	Cohen	Board certified		Numerous tiny nodular opacities noted throughout	D-39
12/07/86	12/08/86	Kerley			Acute fractures of the right 5th and 7th lungs, diffuse fine nodular densities throughout	D-5
12/09/86	12/09/86	Rouse			Evidence of focal atelectasis within the lung bases bilaterally and suggestion of bilateral basilar effusion; underlying pneumonic infiltrate within right lung base cannot be completely excluded	D-5
12/09/86	08/20/87	Cole	Board certified, B-reader	U/R	Unable to evaluate	D-8
12/09/86	09/03/87	E.N. Sargent	Board certified, B-reader	U/R	Unreadable	D-9
01/07/87	01/08/87	Rouse			Considerable and almost complete resolution of previous basilar effusion	D-128

06/24/87	06/30/87	Cohen	Board certified	1	1/1	D-11
06/24/87	07/17/87	Cole	Board certified, B-reader	2	2/2	D-10
05/24/88	05/24/88	Bruton			Changes consistent with CWP	D-128
05/24/88	09/28/99	Sargent	Board certified, B-reader	3	2/2	D-130
06/18/91	06/19/91	Dukes			Advanced extensive diffuse nodular fibrosis suggesting some type of pneumoconiosis	D-61
06/18/91	12/07/91	Cole	Board certified, B-reader	2	2/2	D-61
01/11/93	01/11/93	Bruton			Granular appearance bilaterally; T2/2	D-128
01/11/93	09/28/99	Sargent	Board certified, B-reader	2	2/2	D-131
08/13/93	08/14/96	Perret			Diffuse parenchymal interstitial infiltrates consistent with CWP	D-128
02/03/94	02/03/94	Bruton			Parenchymal nodular densities bilaterally consistent with pneumoconiosis	D-128
02/03/94	09/28/99	Sargent	Board certified, B-reader	3	2/2	D-132
06/10/94	06/17/94	Cohen	Board certified		Innumerable small bilateral nodular densities	D-83

10/23/95	10/26/95	Bruton			Increased markings bilaterally in all lung fields, grade T2/2, consistent with anthracosilicosis	D-128
10/23/95	09/28/99	Sargent	Board certified, B-reader	3	2/2	D-133
08/13/96	08/14/96	Perret			Changes consistent with CWP	D-128
08/13/96	09/28/99	Sargent	Board certified, B-reader	3	2/2	D-134
11/15/96	11/15/96	Bruton			Bilateral infiltrates consistent with pneumoconiosis	D-128
11/15/96	09/28/99	Sargent	Board certified, B-reader	U/R		D-135
09/16/97	09/19/97	Bruton			Interstitial markings suggestive of CWP	D-128
09/16/97	09/28/99	Sargent	Board certified, B-reader	3	2/2	D-136
05/15/98	05/19/98	Bruton			2/2	D-128
05/15/98	09/28/99	Sargent	Board certified, B-reader	3	2/2	D-137

Pulmonary Function Tests[4]

[4]Values listed in parentheses in these charts represent the qualifying disability standards. *See* 20 C.F.R. § 718.204(b)(i) (pulmonary function) and 20 C.F.R. § 718.204(b)(ii) (arterial blood-gas).

Date	Physician	Height	Age	FEV_1	FVC	MVV	FEV_1/ FVC	Exhibit
06/24/87	L.J. Seargeant	68.5	60	2.58 (1.94)	3.18 (2.47)	96.5 (77)	81% (55%)	D-4
01/05/88	Bruton	70	61	2.77 (2.04)	3.76 (2.61)	112 (82)	74% (55%)	D-128
08/19/88	Hudson	69	61	2.65 (1.95)	3.70 (2.49)	102 (78)	72% (55%)	D-31
08/19/88	Hudson (post)	69	61	2.61 (1.95)	3.24 (2.49)	74 (78)	81% (55%)	D-31
01/11/93	Bruton	70	66	2.50 (1.96)	3.42 (2.52)		73% (55%)	D-128
09/16/97	Bruton	68	71	2.54 (1.73)	3.31 (2.24)		77% (55%)	D-128

Arterial Blood-Gas Studies[4]

Date	Physician	pCO_2 at rest	pO_2 at rest	pCO_2 after exercise	pO_2 after exercise	Exhibit
12/07/86	Bruton	36.2	61.0 (64)			D-5
12/08/86	Bruton	39.1	68.2 (61)			D-5
12/09/86	Bruton	40.9	56.5 (60)			D-5
01/08/87	Bruton	39	65 (61)			D-128
06/24/87	L.J. Seargeant	41	60 (60)	39	66 (61)	D-7
01/05/88	Bruton	38.8	66.5 (61)			D-128
05/24/88	Bruton	37	66 (63)			D-36

08/19/88	Hudson	39.8	71.6 (60)	D-31
01/11/93	Bruton	40	72 (60)	D-128
08/13/96	Perret	35	75 (65)	D-128
11/15/96	Bruton	35	73 (65)	D-128

Medical Reports

Dr. Charles W. Bruton treated the Miner dating from 1986, including an admission to Oak Ridge Hospital in December 1986 for fractured ribs. (D-128.) During that admission, the Miner underwent arterial blood-gas tests with qualifying results under the black lung disability standards. On that occasion, Dr. Bruton noted the Miner's history of coal mine employment and diagnosed acute fracture of the fifth and sixth ribs with associated respiratory failure and pneumoconiosis. Dr. Bruton's records also detail the existence of osteoporosis, calcification of the aortic knob, mild cardiomegaly, and dyspnea on exertion. On January 5, 1988, Dr. Bruton stated that he would forward the Miner's medical records in response to his black lung claim, but that the test results were "actually pretty good and . . . unlikely to meet the disability requirement . . ." In an August 18, 1997 report, Dr. Bruton opined that the Miner would have difficulty lifting a belt weighing one hundred pounds waist high and shoveling coal onto the belt. After administering a chest x-ray and pulmonary function test on September 16, 1997, Dr. Bruton opined that the Miner had CWP and "should not in any way perform any strength maneuvers nor should he in any way work underground because of his CWP."

Dr. L.J. Seargeant conducted an examination in conjunction with the Miner's claim for benefits on June 24, 1987. (D-6.) The Miner reported working thirty-five years underground in coal mines and that he smoked for three years ending in 1963.[5] Dr. Seargeant viewed an x-ray and diagnosed chronic obstructive pulmonary disease and pneumoconiosis related to his coal mine employment and smoking history.

Dr. Arnold R. Hudson, Jr. evaluated the Miner on August 19, 1988. (D-31.) Dr. Hudson reviewed the Miner's pulmonary function tests and medical records from the Miner's hospital admission for his broken ribs. Dr. Hudson also conducted a pulmonary function test and an

[5]The Miner continued working in coal mines for several years.

arterial blood-gas test.[6]

Dr. William H. Anderson reviewed pulmonary function tests and reported a minimal impairment that was not in the range calculated to interfere with his activity in any way or to indicate disability. (D-33.) Dr. Anderson explained that the Miner's blood-gas results represented a mild impairment that would not be calculated to affect his function in any way. Dr. Anderson could not ascertain to what degree the impairment should be attributed between his previously fractured ribs and category 2 pneumoconiosis, but did opine that the Miner's mild impairment "would not be expected to cause symptoms or interfere with his activity in any way and would not . . . meet the criteria for disability under the [black lung] regulations."

Dr. Burrell examined the Miner and reviewed his medical history. (D-95.) Dr. Burrell opined that the Miner was:

> [T]otally and permanently disabled from all gainful employment, that he [was] incapable of maintaining any type of gainful employment except the most sedentary type of work which would preclude him from doing any type of physical labor similar to that that he performed in the coal mine or that required any significant walking, lifting, bending or stooping.

Dr. Burrell concluded that the Miner's "shortness of breath and exertional dyspnea [were] related to his coal miner's pneumoconiosis which is the contributing cause of [his] total disability."

The Miner was pronounced dead by Dr. David Petty, Jr. on April 24, 1999. Dr. Petty examined the Miner but was unable to determine the cause of death. The Miner had been working in his garden and was found without a pulse in his tool shed. Dr. Ronald Hall, had treated the Miner dating from 1994 and knew of the existence of pneumoconiosis, (D-129), signed the death certificate and listed the immediate cause of death as "unknown" and the underlying cause as "natural causes." (D-126.)

Dr. Lynne F. Blake, a pathologist, conducted a postmortem biopsy of a sample of the Miner's lung and submitted a report dated May 18, 1999. (D-127.) Dr. Blake examined a

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[6]River Basin cited to Dr. Hudson's medical opinion, but there is no such evidence in the record. River Basin averred that Dr. Hudson concluded:

> From the pulmonary standpoint alone he should be capable of all types of work except perhaps sustained arduous manual labor, such as continually shoveling coal. If patient is indeed experiencing as much shortness of breath and chest pain as he describes I would recommend cardiac evaluation since history strongly suggestive of coronary disease. (D-76 at 10 (*citing* "Ex. 1."))

"triangular shaped, spongy, black to gray-black, mass of apparent lung tissue measuring 4.5 cm in greatest length, 2.8 cm. in greatest width and from 1.2 up to 1.7 cm. in thickness." The specimen was sectioned and totally embedded. Dr. Blake's predominant finding was numerous small areas of fibrosis throughout containing an abundance of black cytoplasmic pigment consistent with anthracotic pigment, the majority of which measured from one to two millimeters. A few nodules measured from three to four millimeters. Dr. Blake examined these few nodules under polarized light and found "innumerable fine doubly refractor crystalline structures consistent with silica particles." Dr. Blake diagnosed simple CWP/associated anthracosilicosis and patchy mild emphysema, predominantly associated with macules of simple pneumoconiosis.

The District Director obtained a March 6, 2000 report by Dr. Joshua A. Perper while considering the Survivor's claim. (D-153.) Dr. Perper, a forensic pathologist, reviewed the Miner's employment, medical, and social history, and eight lung tissue sections. Dr. Perper diagnosed significant and severe simple coal worker's pneumoconiosis based upon the Miner's employment in coal mines for more than forty years, worsening respiratory symptomatology in the last few years of his coal mining work, laboratory tests indicating hypoxemia with abnormal arterial blood gasses and mild obstruction, and the radiological and pathological findings. He opined that the pneumoconiosis was a substantial contributory cause of the Miner's death and that the mechanism of death was both direct pulmonary impairment based upon the severity of the pneumoconiotic process in the lung tissue taken at autopsy, and hypoxemia that resulted in cardiac arrhythmia on the background of arteriosclerotic coronary heart disease. Dr. Perper noted two studies which substantiated a greater incidence of cardiac arrhythmia in patients with chronic obstructive pulmonary disease.

Dr. Richard L. Naeye, a pathologist, reviewed the Miner's occupational history and medical records. (D-162.) He noted in a June 12, 2000 report that the Miner died at seventy-two years of age of no identified cause and that only one block of lung tissue had been examined. Dr. Naeye noted forty-two years employment as an underground coal miner with increasing dyspnea on exertion and cigarette smoking prior to 1962-1964. He recited the pulmonary function and blood-gas values dating from 1986 and the Miner's complaints of respiratory problems to various physicians. Dr. Naeye reviewed five slides containing eighteen pieces of lung tissue which revealed black pigment in deposits ranging from 0.4 to 3.0 millimeters in diameter, fibrous tissue and birefringent crystals of all sizes admixed with the black pigment, thin rims of focal emphysema surrounding many of the deposits, and a much greater quantity of mild to moderate centrilobular emphysema. He criticized Dr. Blake's finding of silica in the slides because Dr. Naeye considered a dark room and oil immersion necessary in order to identify silica, while such procedures were not indicated by Dr. Blake.

Dr. Naeye did not believe the slides were representative of the lungs as a whole, could not determine which lobe the tissue came from, and could not be certain whether a pathologist or an undertaker removed the tissue. He was suspicious because of the "fact that tissue from the single block of lung removed at autopsy was cut into [eighteen] tiny pieces," which he believed reflected that the objective of the examination was qualitative rather than quantitative. He noted in an April

16, 2001 deposition that the autopsy did not follow the standard procedures for examining and describing the thoracic cavity before removing representative cross-sections from all the lobes of the lungs and found "[t]he whole thing bizarre." Dr. Naeye noted that the Miner's bronchi were not examined, so it was impossible to determine whether chronic bronchitis was present. Dr. Naeye further criticized Dr. Blake's examination for failing to detail how the samples were reviewed and how the conclusions were drawn. He also noted that Dr. Blake failed to make an important distinction between focal and centrilobular emphysema.

Dr. Naeye opined that the Miner had severe simple CWP, but that if the severity of CWP on the slides had been present throughout the Miner's lungs he would not have had normal and near normal blood gas and pulmonary function values throughout the years. Dr. Naeye cited a study which showed that the bronchitis developed by nonsmoking coal miners usually disappears or markedly abates after leaving the industry, which would reflect the Miner's mostly normal lung function results. In his deposition, Dr. Naeye opined that there was no evidence that the Miner had functionally significant lung disease as late as one year before he died. Based on the test results, Dr. Naeye disagreed with Dr. Perper's conclusions that the Miner had been impaired, had COPD or hypoxemia, or that CWP contributed to his death.

Dr. Naeye opined that the Miner's respiratory complaints could have been related to his fractured ribs, but he could not determine to what degree the Miner's rib pain prevented him from working, compared with his severe simple CWP. He explained that a 1994 diagnosis by Dr. Deleese showed aortic valvular abnormalities which rendered him prone to sudden and fatal cardiac arrhythmia. Dr. Naeye concluded that the test results suggest that the Miner's simple CWP was not severe enough to meet the disability standards and did not contribute to or hasten his death.

Dr. Erika C. Crouch, an anatomic pathologist specializing in pulmonary pathology, contributed a report dated July 24, 2000. (D-165.) Dr. Crouch reviewed the five glass slides, the corresponding autopsy report, four paraffin blocks, and the Miner's medical records. She noted "at least moderate, simple coal workers' pneumoconiosis," extensive dark deposits consistent with coal dust in a predominantly peribronchovascular distribution, numerous macules and scattered coal dust micronodules a few millimeters in diameter, some with associated focal emphysema, and focal mild interstitial fibrosis. She did not observe any coal dust nodules, areas of massive fibrosis, silicotic nodules, or changes of complicated silicosis. Based on the slides, Dr. Crouch concluded the Miner's occupational coal dust exposure was insufficient to have caused a clinically significant degree of functional impairment or disability and did not cause or hasten his death secondary to complications of artherosclerotic cardiovascular disease.

In a February 26, 2001 deposition, Dr. Crouch explained her disagreement with Dr. Perper regarding the severity of pneumoconiosis and the cause of death. Dr. Crouch did not see pathological evidence to indicate the existence of obstructive pulmonary disease. She did agree that artherosclerotic heart disease was likely the immediate cause of death, but did not believe that the changes of CWP were significantly severe to have played any role in the development of fatal

arrhythmia or other terminal complication related to the heart. She noted that the moderate severity of CWP seen in the Miner would be insufficient to cause a significant degree of functional impairment and would not have a significant impact on the heart. Dr. Crouch noted that the records had poorly documented the Miner's cardiac disease, but that such diagnosis had been "carried along" throughout the Miner's medical history.

Dr. P. Raphael Caffrey, a pulmonary pathologist, reviewed the Miner's medical records and prepared two reports dated December 15, 2000 and January 17, 2001. Dr. Caffrey also testified in a deposition on March 19, 2001 and opined that the Miner had a moderately severe degree of CWP, but not complicated CWP. Dr. Caffrey stated that the CWP could have been partially responsible for the Miner's pulmonary problems, but that he also had a history of cardiac problems which were not caused by his exposure to coal dust or related to his pulmonary problems. Dr. Caffrey concluded that the Miner's fatal cardiac arrhythmia was the result of his cardiac disease because the Miner's medical history did not reveal a pulmonary impairment significant enough to cause or hasten the Miner's death.

Dr. Thomas M. Jarboe reviewed all of the Miner's medical records and issued a March 7, 2001 medical report. He concluded that the Miner did have simple CWP, but did not have a significant pulmonary or respiratory impairment and was not disabled based upon the pulmonary function and blood-gas tests. He agreed with Dr. Naeye that the lung slides displayed severe simple CWP, but were not representative of the remainder of his lung when compared with the pulmonary function and blood-gas tests. Dr. Jarboe also concluded that CWP did not have a significant effect on the Miner's course while he was living, and did not cause, contribute to, or hasten the Miner's death. He agreed with Doctors Crouch and Naeye that the lung slides did not demonstrate pneumoconiosis sufficient to cause a significant functional impairment or disability. Dr. Jarboe disagreed with Dr. Perper's conclusion that the Miner's pulmonary involvement and COPD were a substantially contributing cause of his death because the spirometry and gas exchange did not suggest a significant impairment and did not indicate an airways obstruction. He also disagreed with Dr. Perper's diagnosis that the Miner was hypoxemic based upon the May 15, 1998 oxygen saturation of ninety-six percent. Dr. Jarboe concluded that the Miner's death was more likely related to coronary artery disease based upon his history of ventricular tachycardia, chest pains, and arteriosclerotic heart disease, and that there was no objective evidence that CWP was causing a significant degree of impairment or derangement which would have contributed to his death.

Dr. James R. Castle reviewed the Miner's medical records and prepared a report dated March 23, 2001. Dr. Castle disagreed with Dr. Perper's finding that the Miner had hypoxemia because he did not develop desaturation with exercise and his blood-gas studies were normal. Dr. Castle also disagreed with Dr. Perper's reference to medical articles regarding the effects of chronic obstructive pulmonary disease because they discussed the effects of tobacco smoke, not coal dust exposure. Dr. Castle noted the Miner's history of coronary artery disease, valvular heart disease, and angina pectoris, which would have contributed to his dyspnea and chest pain. Dr. Castle concluded that the Miner did have CWP, but that it was not totally and permanently

disabling, and that it neither caused, contributed to, nor hastened his death. These conclusions were based upon the pulmonary and blood-gas results and the Miner's history of valvular heart disease, coronary artery disease, and ventricular tachycardia. Dr. Castle believed the Miner would have died as and when he did regardless of his occupational coal dust exposure.

Dr. Grover M. Hutchins, a pathologist, reviewed the Miner's medical records and the lung tissue slides and prepared a report dated March 29, 2001. Dr. Hutchins noted that the limited clinical and pathological information available made it difficult to determine whether the Miner's respiratory symptoms were related to lung disease or cardiac disease. Dr. Hutchins determined that the Miner had severe simple CWP with prominent peri-macular scar emphysema, but could not evaluate the existence of chronic bronchitis due to the lack of larger bronchi. Dr. Hutchins noted the Miner's mild obstructive disease from the clinical studies and opined that the Miner's CWP may have accounted for a mild component of respiratory impairment, but that the more probable cause of death was his ischemic heart disease unrelated to his coal dust exposure, manifested by angina pectoris, congestive heart failure, and arrhythmia. Dr. Hutchins did not believe the Miner was totally disabled prior to his death and that his death was not related to or hastened by his CWP.

Dr. Ben V. Branscomb, a lung specialist, reviewed the Miner's medical records and issued a report on January 16, 2001 followed by a deposition on April 2, 2001. He noted the Miner's irregular complaints regarding shortness of breath, the normal pulmonary function results, and the existence of simple pneumoconiosis based upon the x-rays and lung tissue sample. Dr. Branscomb did not believe the Miner had a respiratory impairment according to the physician's notes and the pulmonary function studies. Dr. Branscomb believed that aortic stenosis, myocardial infarction, or a blood clot were the most likely causes of the Miner's sudden cardiovascular death, but that his pneumoconiosis in no way contributed to his death.

Discussion

New Regulations

On December 20, 2000, the United States Department of Labor published final rules amending the black lung regulations, effective January 19, 2001. With the exception of certain sections, the amended regulations were to apply to future and pending claims. *See* 20 C.F.R. § 725.2 (2001). The United States Court of Appeals for the District of Columbia affirmed in part and reversed in part the new regulations. *See* Nat'l Mining Ass'n v. Dep't of Labor, No. 01-5278 (D.C. Cir. June 14, 2002). However, none the regulations deemed impermissibly retroactive or substantively invalid are involved in the adjudication of these claims.

As applicable to this claim, Section 718.204(a) is not impermissibly retroactive because it merely incorporates the Sixth Circuit's interpretation that independent disabilities unrelated to a miner's pulmonary or respiratory disability shall not be considered when determining whether the miner was totally disabled due to pneumoconiosis. The Sixth Circuit has held that the fact that a

claimant may be disabled by an unrelated injury "is not grounds for denying his claim for benefits." Cross Mountain Coal, Inc. v. Ward, 93 F.3d 211, 217 (6th Cir. 1996). The D.C. Circuit's decision leaves "the state of the law on this question exactly as it was prior to the regulations' promulgation . . ." Nat'l Mining Ass'n v. Dep't of Labor No. 01-5278.

The D.C. Circuit found 20 C.F.R. § 725.212(b) to be impermissibly retroactive as applied to claims filed before January 19, 2001, but this does not affect the application of 20 C.F.R. § 725.212(a), which was not amended.

Accordingly, the amended regulations apply to this claim with the following exceptions: §§ 725.310, 725.367, 725.406-725.418, 725.421(b), 725.423, 725.456, 725.458, 725.465, 725.491-725.495. Because both the Miner's and Survivor's claims were pending before January 19, 2001, the version of those sections revised as of April 1, 1999 applies here, while the new regulations apply otherwise. *See* 20 C.F.R. § 725.2.

Responsible Operator

The District Director identified the Employer as the successor operator to River Basin in a three hundred twenty-nine page special determination issued on February 17, 2000. (D-145.) The Employer contested its designation as the responsible operator, (D-153), and submitted a motion to dismiss on November 2, 2000, because the District Director's designation violated due process and was precluded by the Board's prior ruling. The Employer argues that the Board's November 26, 1996 decision solidified River Basin as the responsible operator and that due process mandates dismissal Key Mining. The Director responds that the Employer was properly identified as the successor operator and that such designation does not deprive the Employer of due process.

An operator who acquires a mine or substantially all of the assets of a mine operator is liable for payment of all benefits which would have been payable to miners previously employed by the prior operator as if the acquisition had not occurred. *See* 20 C.F.R. § 725.493(a) (1999). Although the District Director designated the Employer as the responsible operator thirteen years after the Miner first filed his claim, the claim has not been finally adjudicated. Identification of a responsible operator can be made "[a]t any time during the processing of a claim." 20 C.F.R. § 725.412(a) (1999). This may unfairly extend operator liability, especially given the infinite availability of modification proceedings, but the Sixth Circuit has upheld such designations for successor operators. *See* Director, Office of Workers' Comp. Programs v. Oglebay Norton Co., 877 F.3d 1300, 1303 (6th Cir. 1989). In that case, the court also found that a successor operator would not be substantially prejudiced despite being identified approximately ten years after the filing of the claim because the successor operator had access to the evidence developed by the prior operator. Here, the Employer has access to all of the evidence developed by River Basin and has shown that it can adequately defend itself. Accordingly, I find that the District Director properly identified the Employer as the successor responsible operator and that the Employer was neither deprived of due process nor substantially prejudiced.

Miner's Claim

A claimant may request modification of a prior denial "on grounds of a change in conditions or because of a mistake in a determination of fact" within one year of the denial of benefits. 20 C.F.R. § 725.310 (1999). Any communication, however informal, may serve as a request for modification. The District Director interpreted the Widow's submission of new evidence as a request for modification of the Miner's claim. In evaluating a request for modification under Section 725.310, the claimant is entitled to *de novo* consideration of the issue. *See* 20 C.F.R. § 725.310(c); Kovac v. BCNR Mining Corp., 14 B.L.R. 1-156 (1990), *aff'd on recon.*, 16 B.L.R. 1-71 (1992).

The Miner bears the burden of establishing the following elements by a preponderance of the evidence: (1) the Miner suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) the Miner is totally disabled, and (4) the Miner's total disability is caused by pneumoconiosis. *See* 20 C.F.R. § 725.202(d).

I support and hereby incorporate Judge Thomas's original findings regarding the existence of pneumoconiosis and its relationship to coal mine employment. The Miner established the existence of pneumoconiosis by x-ray evidence in the original claim and it is supported by the autopsy evidence submitted in the Survivor's claim. I credit the Miner with forty-two and three-quarters years of coal mine employment and he is entitled to the rebuttable presumption that the pneumoconiosis was related to his coal mine employment.

The following medical criteria can establish total disability: pulmonary function studies, blood-gas studies, evidence of cor pulmonale, or reasoned medical opinion. *See* 20 C.F.R. § 718.204(b). There is no evidence of cor pulmonale. None of the pulmonary function tests and only three of the twelve arterial blood-gas results meet the disability standards. Two of the qualifying blood-gas results occurred when the Miner was admitted for fractured ribs with associated respiratory failure and it is highly likely that the results reflect effects of the Miner's fractured ribs rather than impairment from pneumoconiosis. I find that the Miner has not established total disability according to the pulmonary function and blood-gas studies.

The medical reports of Doctors Seargeant, Bruton, and Anderson were admitted in the previous decisions regarding the issue of total disability. The reports of Doctors Hudson, Burrell, and Bruton, although allegedly submitted during the previous claims, were not admitted in the record and therefore not considered.

Medical records from Dr. Hudson appear in the record, but there are no reports offering his opinion regarding total disability. The Board noted in its July 25, 1991 decision that Dr. Hudson "offered no opinion as to the degree of the miner's disability." In its August 30, 1994 decision, the Board stated, "the report by Dr. Hudson contained in the record before us does not contain an opinion addressing the issue of disability." A thorough review of the record does not reveal any statements by Dr. Hudson regarding his opinion of the Miner's level of disability. I

cannot consider an opinion that is not available in the record.

The Miner submitted Dr. Burrell's January 15, 1996 report on January 24, 1996. The Miner does not explain why Dr. Burrell's report was submitted in a supplemental brief after Judge Romano had issued his 1996 decision, rather than being properly submitted to the District Director as new evidence of a change in condition. In the subsequent appeal, brief mention was made of Dr. Burrell's report. On remand in 1997, Judge Romano again did not admit Dr. Burrell's report in evidence. The Miner mentioned Dr. Burrell's report in his petition for review to the Board, but did not challenge Judge Romano's failure to consider it. The Board refused to consider Dr. Burrell's report because it had not been received in evidence. The Sixth Circuit held that the Board properly declined to review Dr. Burrell's report because it had not been received in evidence.

Rules governing the admission of evidence in black lung claims are more lenient than those found in the Federal Rules of Civil Procedure, but evidence submitted post-hearing requires waiver by the parties or remand to the District Director. *See* 20 C.F.R. § 725.456(b) (1999). The Employer did not waive the requirement that documentary evidence be submitted at least twenty days before the hearing. While parties are entitled to *de novo* consideration, the Board has noted limitations on the admission of evidence in a modification. *See* Shertzer v. McNally Pittsburgh Manufacturing Co., BRB No. 97-1121 BLA (June 26, 1998) (holding that evidence in existence at the time of an earlier decision, but not made available should be excluded on modification); 20 C.F.R. §725.456(d), Wilkes v. F&R Coal Co., 12 B.L.R. 1-1 (1988) (mandating the exclusion of withheld evidence in the absence of extraordinary circumstances).

Modification proceedings balance the dueling jurisprudential concerns of finality and accuracy. The interest of judicial finality may be outweighed in the pursuit of accuracy under the "justice under the Act" standard. *See* Old Ben Coal Co. v. Director, OWCP, 2002 WL 1117775 at *6-11 (7th Cir. 2002). While I recognize the importance of allowing modification proceedings in order to render "justice under the Act," adjudication of these modification proceedings must still adhere to the "interest of justice" by carefully considering the importance of judicial finality, dispute resolution, resource management, and the party's diligence. *See* Id. at *15-16 (Wood, J., dissenting). The Sixth Circuit recently noted the prudential, discretionary authority in admitting newly submitted arguments. *See* Youghiogheny & Ohio Coal Co. v. Milliken, 200 F.3d 942, 954-55 (6th Cir. 1999) (explaining that issues not raised on appeal are generally considered abandoned, but that they can be reconsidered to avoid an unfair or unjust result).

To allow evidence that was readily available before an adverse decision to be used under the guise of modification to seek (or terminate) black lung benefits would be inherently unfair and devour valuable resources. The Miner did not re-submit Dr. Burrell's report after the Board remanded the claim to Judge Romano in 1996 despite ample opportunity to request modification or to challenge its exclusion. Instead, the Miner abandoned this evidence until 1999. Even given the liberal interpretation of modification proceedings, I believe it would be unfair to admit evidence neither properly submitted nor diligently pursued. Accordingly, I will not admit Dr.

Burrell's report in evidence in this claim.[7]

Dr. Bruton's report was originally offered (improperly to the Board) on September 4, 1997. It was not previously admitted in the record because the claim was on appeal. I hereby admit Dr. Bruton's report as timely submitted evidence for modification of the Miner's claim. The remaining medical reports[8] were submitted in the Survivor's claim and, to extent that they offer opinions regarding the Miner's disability, are hereby admitted.

I find that the medical opinion evidence establishes that the Miner was not totally disabled prior to or at the time of his death. The medical opinions of Doctors Anderson, Naeye, Crouch, Caffrey, Jarboe, Castle, Hutchins, and Branscomb that the Miner was not totally disabled were well documented and reasoned. Dr. Bruton believed the Miner was totally disabled despite the non-qualifying pulmonary function test he administered on September 16, 1997. The results of this test were far from the qualifying disability values and Dr. Bruton failed to explain or reconcile this fact. While two of Dr. Bruton's early blood-gas studies revealed disability values, he did not reconcile the impact of the Miner's fractured ribs on these tests, nor did he reconcile the subsequent non-qualifying blood-gas studies. The third qualifying blood-gas study was conducted at rest whereas the post-exercise results were non-qualifying. Considering the numerous non-qualifying clinical tests and the well-reasoned medical opinions that the Miner was not totally disabled, I find that the Miner failed to establish total disability prior to his death.

Survivor's Claim

A miner's surviving spouse is entitled to black lung benefits if she establishes "that the deceased miner's death was due to pneumoconiosis." 20 C.F.R. § 725.212(a). Specifically, the surviving spouse must prove that: (1) the miner had pneumoconiosis, (2) the miner's pneumoconiosis arose out of coal mine employment, and (3) the miner's death was due to pneumoconiosis. *See* 20 C.F.R. § 718.205(a).

The existence of pneumoconiosis has been established by x-ray and autopsy evidence. I credit the Miner with forty-two and three-quarters years of coal mine employment and find that the pneumoconiosis arose out of his coal mine employment.

Death is considered due to pneumoconiosis if any of the following criteria are met: (1) competent medical evidence established that death was due to pneumoconiosis; or (2)

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[7]I believe remanding this claim to the District Director for proper submission of Dr. Burrell's report would constitute a waste of time and resources. Dr. Burrell's report, when considered with the other evidence, would still not establish total disability because he failed to reconcile his opinion with the pulmonary function and arterial blood-gas results.

[8]Medical evidence submitted in the Survivor's claim is comprised of the reports of Doctors Hall, Petty, Blake, Perper, Naeye, Crouch, Caffrey, Jarboe, Castle, Hutchins, Branscomb.

pneumoconiosis was a substantially contributing cause or factor leading to death or the death was caused by complications of pneumoconiosis; or (3) the presumption of § 718.304 (complicated pneumoconiosis) is applicable. *See* 20 C.F.R. § 718.205(c). If the principal cause of death was a medical condition not related to pneumoconiosis, a survivor must establish that pneumoconiosis was a substantially contributing cause of the death or hastened the death. *See* 20 C.F.R. § 718.205(c)(4)-(5).

Dr. Perper's opinion that pneumoconiosis was a substantially contributing cause of the Miner's death is based upon the severity of pneumoconiosis in the lung tissue taken at autopsy. The Employer argues that the autopsy evidence is unreliable because the autopsy procedure was performed improperly and the tissue sample was limited and unrepresentative. The first argument is supported by Dr. Blake's own statement describing the specimen as "apparent" lung tissue. However, Dr. Blake's autopsy report does meet the criteria set forth at 20 C.F.R. § 718.106 (1999). Dr. Blake gave gross and microscopic descriptions of the specimen and the entire autopsy report was submitted in the record. The Employer's highly qualified physicians may find this autopsy report unreliable (or "bizarre") according to their standards, but it is sufficient under the black lung regulations.

The Employer argues that if these tissue samples were representative of the Miner's lungs, the pulmonary function and arterial blood-gas studies would not have displayed normal or near normal values. The autopsy report was limited to a small lung section of "apparent" lung tissue and did not purport to represent the lungs. Dr. Perper's opinion did not reconcile the pulmonary function and arterial blood-gas studies conducted before the Miner's death nor did he acknowledge that the autopsy was not representative of the Miner's lungs. Dr. Perper also failed to sufficiently explain the relationship between the Miner's simple pneumoconiosis and the development of fatal arrhythmia and other cardiac complications. On the contrary, I find the medical reports of Doctors Naeye, Caffrey, and Jarboe to be well documented and reasoned. Each considered the Miner's employment and medical history in reaching the conclusion that the tissue sample was not representative of the lungs when compared with the test results. Their opinions are supported by the following facts: no physician diagnosed more than simple pneumoconiosis, the pulmonary function and arterial blood-gas studies did not reveal a totally disabling pulmonary impairment, and the Miner suffered from a cardiac disease which was the primary cause of death. I find that the Widow has failed to establish that pneumoconiosis was a substantially contributing cause of or hastened the Miner's death.

ORDER

The Employer's motion for its dismissal as the responsible operator is hereby denied. The Miner's claim for benefits and the Widow's claim for survivor benefits are hereby denied.

A

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Order may appeal it to the Benefits Review Board within 30 days from the date of this Order by filing a Notice of Appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Francis Perkins Building, Room N-2605, 200 Constitution Avenue, N.W. Washington, D.C. 20210.